American Bar Association
Section of Antitrust Law
Comments for Federal Trade Commission Public Workshop
"Possible Anticompetitive Efforts to Restrict Competition on the Internet"

The Section of Antitrust Law of the American Bar Association is pleased to submit the following comments in connection with the Commission's public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet," scheduled for October 8-10, 2002.

These views are being presented on behalf of the Antitrust Section only and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the Association.

The Commission's Federal Register Notice identified state regulations protecting certain interests from competition on the Internet and private conduct limiting certain means of competition on the Internet as areas of particular interest. More specifically, the Notice included the following questions: Does state regulation have "protectionist effects," and if so, how? What are the costs, benefits and prevalence of such regulation? Do businesses try to limit competition over the Internet, and if so, how? What justifications are advanced for any such limitations?

In response to these questions, the comments that follow will focus on cataloging those state regulations and private practices identified by members of the Section of Antitrust Law that may have a potential impact on the ability to do business over the Internet. These comments do not concentrate on particular products, services or industries, but undertake to address laws and principles of more general applicability. The Section membership includes over ten thousand practitioners, academics, enforcers

and others with experience with the antitrust laws, and through several of its committees—including the Computer & Internet Committee, Exemptions & Immunities Committee, Franchise & Dealership Committee, and the Sherman Act Section 1 Committee—the Section canvassed a substantial cross section of its members in order to provide the Commission with the benefit of their collective experience.

In the time available between the announcement of the Workshop and the deadline for submitting comments, the Section did not undertake to formulate positions or recommendations in response to the general questions posed regarding competition on the Internet, but if the Commission adopts any specific proposals as a result of the Workshop, the Section may comment on those proposals at an appropriate time. Likewise, the Section has not undertaken to collect the secondary literature on the relevant subjects or to duplicate the analyses presented there. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L. J. 1 (2002); Robert D. Atkinson & Thomas G. Wilhelm, *The Best States for E-Commerce*, Progressive Policy Institute (2002); Robert W. Hahn & Anne Layne-Farrar, *Is More Government Regulation Needed to Promote E-commerce?* AEI-Brookings Joint Center for Regulatory Studies (2002).

These comments are divided into two sections. The first presents state regulations that impact the ability to compete over the Internet. The second presents private practices that impact the ability to compete over the Internet. By including any particular regulation or practice, the Section is not representing that any of these are unreasonably anticompetitive, or necessarily anticompetitive at all, nor is the Section presenting the procompetitive justifications that may exist for particular regulations or practices. As

recognized in the Commission's Federal Register Notice, "much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales," and it is not the Section's present purpose to pass judgment on any of these regulations or practices. The purpose is merely to provide a list of regulations and practices that have come to the attention of Section members and that may help the Commission to obtain a more complete picture of the competitive landscape of Internet commerce.

One of the most striking features of the information collected is that there is little statutory law or case law specifically addressing competition on the Internet, and most of the law pertinent to Internet competition applies to distribution in general. Cyberspace may sound like a new and uncharted territory, but in many respects e-commerce is simply one more means for distributing goods and services, and is subject to many of the same rules. For example, several of the statutes identified in the discussion of state regulation fall into the category of state franchise and dealership legislation. The case law pertinent to the discussion of private business practices is drawn from the general law of vertical restraints, including vertical sales restraints (*e.g.*, customer and territorial restraints, exclusive distributorships, and resale price maintenance) and vertical purchasing restraints (*e.g.*, exclusive dealing). This law has been reviewed and analyzed elsewhere by the Section of Antitrust Law, and those discussions will not be repeated here. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 130-228 (5th ed. 2002); Monograph No. 17, Franchise Protection: Laws Against Termination and the Establishment of Additional Franchises (1990).

I. State Regulation Impacting Internet Sales

Members of the Section have identified a number of state regulations as having an impact on competition on the Internet. The most frequently cited are state statutes

enacted for the protection of franchisees, dealers and distributors. These generally fall into two broad categories: (1) statutes that are generally applicable, regardless of industry, to "franchisees" or, in the case of Wisconsin, to "dealers"; and (2) statutes for the protection of franchisees, dealers or distributors in specific industries. For example, all states have comprehensive statutes regulating motor vehicle manufacturers' relationships with dealers, and many states also have statutes regulating the respective rights and duties of alcoholic beverage distributors and their suppliers, and dealers of farm implements and industrial or construction equipment and their suppliers. These statutes have provisions that actually or potentially limit Internet sales by franchisors and manufacturers, and the principal types of such provisions are listed below.

More specifically, the following types of state statutes may have actual or potential impact on e-commerce:

A. Motor vehicle dealer statutes that have the effect of prohibiting a manufacturer from selling new vehicles directly over the Internet by making it unlawful to sell or lease a motor vehicle to a consumer except through an authorized motor vehicle dealer (*e.g.*, Franchise Practices Act, N.J. Stat. Ann § 56:10-27), or by prohibiting a manufacturer from selling or leasing a motor vehicle to a consumer (*e.g.*, Ariz. Rev. Stat. § 28-4460 (B)(2)).

B. Statutes that, regardless of the industry, prohibit a franchisor from "encroaching" on a franchisee's territory (*e.g.*, Franchise Act, Iowa Code Ann. § 523H.4, § 537A.10(6)).

C. Statutes that, regardless of industry, bar a franchisor from competing with a franchisee in the franchisee's exclusive territory (*e.g.*, Franchise Investment Protection Act, Wash. Rev. Code Ann. § 19.100.180(2)(f)).

D. Statutes that, regardless of the industry, bar a manufacturer from substantially changing the competitive circumstances of its agreement with a dealer without good cause (*e.g.*, Wisconsin Fair Dealership Law, Wis. Stat. Ann. §135.03).

E. Statutes that prohibit the direct importation of certain products, requiring instead the use of in-state distributors (*e.g.*, Indiana Code Ann. § 7.1-5-11-1.5).

F. Statutes that require out-of-state suppliers to maintain in-state operations or to comply with state registration requirements (*e.g.*, Texas Education Code § 31.151).

A. Statutes Prohibiting a Manufacturer's Direct Internet Sale of Products to End-Users.

A number of states, including Arizona and New Jersey, have motor vehicle dealer statutes that prohibit the direct sale or lease by manufacturers of motor vehicles to retail consumers. These effectively preclude Internet sales by motor vehicle manufacturers. Any product constituting a "motor vehicle" under these statutes must be sold solely through a dealer. For example, the New Jersey statute makes it a violation for any "motor vehicle franchisor . . . to offer to sell or sell motor vehicles, to a consumer . . . except through a motor vehicle franchisee." Franchise Practices Act, N.J. Stat. Ann. § 56:10-27.

B. Statutes Prohibiting "Encroachment."

Besides the Internet prohibitions in the state motor vehicle dealer statutes described above, other state laws prohibiting a franchisor's addition of a franchisee in close proximity to an existing franchisee, sometimes termed "encroachment," also have the potential to impact competition on the Internet, depending upon how broadly their language is interpreted, including whether regulation of *franchisee* appointments also limits direct sales by a *franchisor.*

For example, Iowa's franchise statute of general application[1] includes a provision prohibiting a franchisor from granting a franchisee the right to develop a new outlet or location in "unreasonable proximity" to an existing franchisee if doing so would have an adverse effect on the gross sales of the existing franchisee's outlet or location.[2] This prohibition does not explicitly address Internet sales by a franchisor, but potentially it could be invoked to bar a franchisor from making Internet sales to consumers. The Iowa statute does not require that a franchisor provide the franchisee an exclusive distributorship in order for the law to apply, and franchisees with nonexclusive distributorships could, in theory, invoke the encroachment prohibition to challenge a franchisor's direct sales to consumers over the Internet.[3]

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1 Franchise Act, Iowa Code §§ 523H.1-.17 (for agreements entered into prior to July 1, 2000); § 537A.10 (for agreements entered into on or after July 1, 2000).

2 Iowa Code Ann. § 537A.10(6).

3 On the issue of whether encroachment also can be challenged as a breach of the duty of good faith and fair dealing, *compare* Vylene Enterprises, Inc. v. Naugles, Inc., 90 F.3d 1472 (9th. Cir. 1996) (holding that the duty had been breached, under California law, by the addition of a franchisor-owned store in close proximity to a franchisee's store); *with* Burger King Corp. v. Weaver, 169 F.3d 1310 (11th Cir. 1999)(holding that there was no duty of good faith and fair dealing applicable under Florida law when the franchisor permitted a franchisee to open a restaurant in close proximity to another franchisee's restaurant).

Similarly, many state motor vehicle dealer statutes prohibit encroachment or require a manufacturer to carry a heavy evidentiary burden to justify adding a new dealer in close proximity to an existing dealer.[4]

C. Statutes Barring a Franchisor from Competing Against a Franchisee.

Some states have franchise statutes of general application that expressly prohibit a franchisor from establishing a company store or outlet in the exclusive territory of a franchisee. For example, Indiana's Deceptive Franchise Practices Act prohibits a franchisor from establishing such a store or outlet,[5] as does the Washington Franchise Investment Protection Act.[6] These provisions can have the effect of prohibiting a franchisor from competing against a franchisee in the franchisee's exclusive territory.

More specifically, the Indiana statute bars a franchisor from "establishing" a company-owned outlet in a franchisee's exclusive territory, while the Washington statute may be broader, making it an unfair or deceptive act or practice or an unfair method of competition for the franchisor simply "to compete with the franchisee in an exclusive territory."

While franchise statutes of general application, such as those in Indiana and Washington, apply by their terms only to a "franchise" relationship, the definition of a franchise in many of these statutes may be broad enough to reach some more ordinary supply relationships between manufacturers and their dealers or distributors.[7]

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[4] For a discussion of the motor vehicle dealer legislation, *see generally* ABA Antitrust Section, Monograph No. 17, Franchise Protection: Laws Against Termination And The Establishment Of Additional Franchises, 89-101 (1990).

[5] Deceptive Franchise Practices Act, Ind. Code Ann. § 23-2-2.7-2(4).

[6] Wash. Rev. Code Ann. § 19.100.180(2)(f).

[7] For a review of some of the case law applying franchise statutes to manufacturer relationships with dealers or distributors, see generally Thomas J. Collin, *State Franchise Laws and the Small Business Franchise Act of 1999: Barriers to Efficient Distribution*, 55 BUS. LAW. 1699, 1726-34 (2000).

Statutory provisions of this type could be used to challenge a franchisor's or manufacturer's Internet sales, and potentially could override any contractual provisions to the contrary. The Iowa Franchise Act, for example, expressly prohibits any contractual provision in conflict with, or any attempted waiver of, any provision of the statute. (Iowa Code § 523H.4; § 537A.10(4)). The Washington Franchise Investment Protection Act prohibits parties from arriving at any agreement that violates any provision of the statute (Wash. Rev. Code Ann. § 19.100.184), and any contract provision purporting to waive compliance with any provision is void and unenforceable. (§ 19.100.220(2)). The Indiana Deceptive Franchise Practices Act declares it unlawful to enter into any agreement that would permit a franchisor to establish a franchisor-owned outlet in a franchisee's exclusive territory or, if there is no exclusivity, to compete unfairly with a franchisee within a reasonable area. (Ind. Code Ann. § 23-2-2.7-1(2)). Accordingly, a franchisor's express reservation of the right to engage in Internet sales potentially could prove ineffective if it were challenged under a statutory provision interpreted by a court to prohibit a franchisor from selling products in competition with a franchisee.

D. Statutes Requiring Good Cause for A Substantial Change in Competitive Circumstances.

Some states have statutes prohibiting suppliers from materially changing the competitive circumstances of a dealership without good cause. For example, the Wisconsin Fair Dealership Law[8] prohibits a manufacturer or other supplier from substantially changing the competitive circumstances of a dealership agreement in the absence of good cause.[9] The precise scope of this provision does not yet appear to have

[8] Wis. Stat. Ann. §§ 135.01-.07.
[9] Id. at §135.03.

been settled by the courts,[10] but one court has suggested that the purpose of the law is to "protect dealers against new competition that has substantially adverse although not lethal effects."[11]

Dealers might cite such provisions as authority to preclude a manufacturer's sales over the Internet. If a manufacturer's sales to end-users in a dealer's area are more than de minimis, the dealer may be in a position to argue that such sales amount to a "substantial change" in the competitive circumstances of its relationship with the manufacturer.[12]

Similar provisions appear in numerous farm implement and equipment dealer statutes.[13] These statutes, many of which originated to require manufacturers to repurchase inventory from terminated farm implement dealers, have evolved into statutes that provide other protections to covered dealers. They may apply, depending upon the jurisdiction, not only to farm implement dealers but also to dealers engaged in the retail sale of outdoor power equipment, construction equipment, and industrial equipment.[14]

Interpreting such a provision from Minnesota's Heavy and Utility Equipment Manufacturers and Dealers Act,[15] the Minnesota Supreme Court has held that a manufacturer's action violates this provision if it is "a change that is material to the continued existence of the dealership, one that significantly diminishes its viability, its

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10 *See* Astleford Equip. Co. v. Navistar Int'l Transp. Corp., 632 N.W.2d 182 (Minn. 2001) (discussing Wisconsin law).

11 Remus v. Amoco Oil Co., 794 F.2d 1238, 1241 (7th Cir. 1986).

12 For examples of provisions requiring good cause for any substantial change in competitive circumstances, *see e.g.,* Ariz. Rev. Stat. § 44-6702(3); Cal. Bus. & Prof. Code § 22902(d); Miss. Code Ann. § 75-77-2(1); Ohio Rev. Code Ann. § 1353.06(A)(1); Tenn. Code Ann. § 47-25-1302(a).

13 Equipment Dealers Protection Act, Va. Code Ann. § 59.1-352.3(A).

14 *See e.g.*, Illinois Equipment Fair Dealership Law, 815 Ill. Comp. Stat. 715/2(2).

15 Minn. Stat. § 325E.0681(1) (an equipment manufacturer may not "terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealership agreement without good cause").

ability to maintain a reasonable profit over the long term or to stay in business."[16] Under this test, a dealer could argue that a manufacturer's Internet sales would pose a threat to the dealer's "ability to maintain a reasonable profit over the long term."

Although the equipment dealer statutes do not apply directly to the sale of consumer goods, the legal interpretations developing under these laws may be transferable to broader statutes such as the Wisconsin Fair Dealership Law, which apply to manufacturer-dealer relationships generally, without regard to industry or product category.

E. Statutes Prohibiting Direct Importation.

Several states have statutes that prohibit the direct importation of certain products (particularly alcoholic beverages and tobacco products) from out-of-state suppliers, requiring out-of-state suppliers to utilize in-state tiered distribution systems and sometimes exempting local suppliers. For example, Indiana Code § 7.1-5-11-1.5 prohibits direct shipment of alcoholic beverages by out-of-state merchants to residents of Indiana. *See* Katy McLaughlin, *Merlot by Mail: Ordering Wine Online Gets Easier*, Wall Street Journal, Aug. 21, 2002, p. D1, col. 2. *See also Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (addressing constitutionality issues); *Bainbridge v. Bush*, 148 F. Supp.2d 1306 (M.D. Fla. 2001) (same); *Swedenburg v. Kelly*, 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000) (same); *compare Dickerson v. Bailey*, 212 F. Supp.2d 673 (S.D. Tex. 2002) (holding law unconstitutional); *Beskind v. Easley*, 197 F. Supp.2d 464 (W.D.N.C. 2002); *Bolick v. Roberts*, 199 F. Supp.2d 397 (E.D. Va. 2002); *Santa Fe Natural Tobacco Co. v. Spitzer*, 2001 WL 636441 (S.D.N.Y. 2001) (declaring cigarette law unconstitutional).

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[16] *Astleford*, 632 N.W.2d at 191 (Minn. 2001).

F. Statutes Requiring In-State Presence or Registration.

Some states have statutes that require out-of-state suppliers (such as mortgage bankers) to maintain in-state offices or comply with state registration requirements. For example, Texas Education Code § 31.151 requires textbook publishers to maintain depositories in Texas, ship through depositories in Texas, or deliver from warehouses less than 300 miles from the Texas border. The Arkansas Internet Prescription Consumer Protection Act, Arkansas Statute § 17-92-1004, requires regulation by the Arkansas State Board of Pharmacy, foreign corporation registration with the Secretary of State, and licensing of prescribing practitioners with the applicable state licensing board. Indiana law requires Internet Pharmacies either to be located in-state or be licensed as a non-resident pharmacy. 225 Ind. Code § 25-26-18-1. California prohibits the practice of medicine into another state without complying with the other state's law. Cal. Bus. & Prof. Code § 2234(g). Other states, including New York, Kansas, Michigan and Iowa, all have restrictions on Internet Pharmacies under consideration. *See* Sara E. Zeman, Regulation of Online Pharmacies: A Case for Comparative Federalism, Specialty Digest: Heath Care, July 2002, Issue 279, at 37-38.

No doubt, other state regulation also impacts competition on the Internet, but the provisions described above are those that members of the Antitrust Section have encountered most frequently.

II. Private Business Practices

Members of the Section have identified a number of private business practices as having an impact on e-commerce.

The most frequently cited examples involve the contractual provisions between a franchisor and its franchisee or between a manufacturer and its dealer or distributor that

may limit Internet sales. There are several variations of such provisions, falling into two broad categories:

A. Limitations on suppliers, including the use of clauses in a franchise or distribution agreement granting a franchisee, dealer, or distributor an exclusive distributorship within an assigned territory, thereby foreclosing the franchisor or manufacturer from selling goods that are subject to the agreement directly to consumers or other end-users (other than national accounts or other categories of customers reserved to the franchisor or manufacturer) in that territory; also, the use of a clause in a franchise or distribution agreement barring the franchisor or manufacturer from establishing a company store or branch in a franchisee's, dealer's, or distributor's assigned territory; and

B. Limitations on dealers, including the use of clauses in a distribution agreement prohibiting a dealer or distributor from reselling the manufacturer's goods through the Internet, or limiting a franchisee's, dealer's, or distributor's right to sell through the Internet.

A. Exclusive Distributorships Impacting Internet Sales By Suppliers.

Franchise or distribution agreements frequently grant the franchisee, dealer, or distributor an exclusive distributorship (or "dealership") within a defined territory. An exclusive distributorship clause bars the franchisor or manufacturer from appointing another franchisee, dealer, or distributor in the same territory, and may (depending on the terms of the contract) bar the franchisor or manufacturer itself from selling to customers in that territory. The purpose is to insulate the franchisee, dealer, or distributor from

intrabrand competition within the territory and thereby provide an incentive for promoting the products that are the subject of the contract by preventing "free riding."

An example of an exclusive distributorship clause with an explicit promise by the franchisor not to open its own store or branch in the franchisee's territory was presented in the contracts between Drug Emporium, Inc. and its franchisees, entered into between 1980 and 1993. Those contracts barred the franchisor from opening its own drugstore operations within a franchisee's territory.[17] Franchisees objected when the franchisor began selling products in competition with its franchisees over its website. Although the franchisor proposed to pay franchisees a 2.5 percent commission on all of its Internet sales to customers within a franchisee's territory, the franchisees objected and initiated arbitration. The arbitration panel enjoined the franchisor from selling over its website, reasoning that the franchisor's virtual store sales constituted a breach of the promise in the franchise agreement not to open its own stores in a franchisee's territory.[18]

In contrast, where a franchisor has reserved the right to develop other businesses or systems and to use any of its trade names with such businesses or systems, a promise not to operate, or license any third party to operate, a retail store within a two-mile radius of the franchisee's store has been ruled not to bar the franchisor from selling products over the Internet in competition with the franchisee.[19]

B. Prohibitions Against a Dealer's Right to Sell on the Internet.

Normally, the law permits manufacturers to limit the number of retailers authorized to sell their products in particular places or to certain classes of customers,

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[17] For discussion of the Drug Emporium contracts, *see* Gaylen L. Knack and Ann K. Bloodhart, *Do Franchisors Need to Rechart the Course to Internet Success?* 20 FRANCHISE L.J. 101, 134 (2001).

[18] *Id.* at 135.

including Internet customers. *See, e.g., Credit Chequers Information Services, Inc. v. CBA, Inc.*, 1999-1 Trade Cas. (CCH) ¶ 72,518, 1999 U.S. Dist. LEXIS 6084 (S.D.N.Y. 1999) (data supplier refused to continue dealing with reseller that began distributing data on the Internet; "a supplier's restriction of its sales to those resellers who meet its specifications is not a per se restraint of trade"). Under these authorities, manufacturers may, in appropriate circumstances, include explicit restrictions against Internet sales in their dealer contracts as the contracts come up for renewal, or may include policies against such sales in "Colgate"-type unilateral distribution policies issued by manufacturers and provided to retailers. *See United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

C. Limitations on Dealers' Internet Sales Outside a Defined Territory.

In most cases, a manufacturer may prohibit a dealer or distributor from selling outside its assigned territory without violating the antitrust laws, *see Continental T.V., Inc. v. GTE Sylvania Inc*, 433 U.S. 36 (1977), although such restrictions will be analyzed under the rule of reason and in a small number of cases have been found unreasonable. In addition, where a restraint is imposed at the behest of a group of dealers, it may be considered horizontal and unlawful. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 157-158 (5th ed. 2002). Accordingly, if a dealer or distributor has its own website and advertises over the Internet, a contract provision barring out-of-territory sales ordinarily would be enforceable to prevent Internet sales to customers outside the territory.

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[19] See Ellen R. Lokker, *Internet Flower Sales Fare Better in Arbitration Than Virtual Drug Store*, 5 THE FRANCHISE LAWYER No. 2 (2001).

D. Manufacturers authorizing only selected dealers to sell over the Internet.

Manufacturers generally may restrict different retailers to different channels of distribution. *See, e.g., White Motor Co. v. United States,* 372 U.S. 253 (1963); *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc.,* 243 F.3d 980 (6th Cir.), *cert. denied,* 122 S.Ct. 460 (2001). Under the same authority, manufacturers arguably may appoint selected dealers as Internet dealers and exclude others. Such a distinction may be the subject of controversy, however, particularly where the distinction is drawn between two existing dealers who already are in competition with one another. Also, if dealer agreements explicitly grant the dealers the right to sell anywhere and in any manner they choose, the manufacturer may not have the contractual right to exclude any of them from the Internet.

E. Manufacturers permitting only themselves to sell over the Internet.

Manufacturers ordinarily may reserve to themselves the right to sell to certain categories of purchasers, such as the government or overseas customers. See, e.g., *White Motor* and *International Logistics Group, Ltd. v. Chrysler Corp.,* 884 F.2d 904, 906-07 (6th Cir. 1989). Under the same authority, manufacturers arguably may reserve Internet customers to themselves as well while prohibiting Internet sales by their dealers.

F. Limitations on the Products that Dealers May Sell on the Internet.

Manufacturers generally may place limitations on which of their products dealers may sell without violating the antitrust laws, and under the same authority they presumably may limit which products dealers may sell over the Internet. *Cf. Purdy Mobile Homes, Inc. v. Champion Home Builders Co.,* 594 F.2d 1313 (9th Cir. 1979) (withholding particular product lines from particular dealers).

G. Restricting Internet Advertising.

Manufacturers have been permitted to enter into cooperative advertising agreements with dealers, where the manufacturer is paying at least part of the expense, in which the manufacturer and the dealer both must agree to the content of the advertising, including any advertised price, so long as the arrangement does not amount to resale price maintenance. *See, e.g., Magnavox Co.,* [1987 - 1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,805 (FTC 1990); *In re Advertising Checking Bureau,* 109 F.T.C. 146 (1987); *Nine West Shoes,* 2000 FTC LEXIS 48 (FTC, April 11, 2000) (consent order). How this principle applies to the Internet is not completely settled, however, and restrictions on cooperative advertising extending to in-store signs and displays has been condemned on the ground that it can prevent retailers from effectively communicating discounts to consumers. Sony Music Distrib. Inc., CCC TRADE REG. REP. (CCH) ¶24, 746 (FTC Aug. 30, 2000). Nevertheless, manufacturers may be able to exercise a certain degree of control over dealer advertising on the Internet where the manufacturer contributes to the dealer's advertising expense. In practice, some manufacturers have taken the position that cooperative advertising funds may not be used on a dealer's existing website; others view a dealer's home page as the only acceptable location for cooperative advertising on that dealer's website.

Without regard to funding, some manufacturers have prohibited dealers from showing prices for their products on certain pages of the dealer's website. For example, some manufacturers will not allow a price to be shown on the home page, some require that the price be a certain number of "clicks" or "pages" past the home page, and some have required that the price only be disclosed after the buyer has at least tentatively selected the item for purchase, presumably based on other considerations.

H. Patent and Copyright Licenses.

Where licensed products are first sold over the Internet, with no *resale,* there may be situations in which the licensor can require its consent to the licensee's selling price, particularly if the licensor's royalties are based on a percentage of the selling price. *See, e.g., LucasArts Entertainment Co. v. Humongous Entertainment Co.,* 870 F. Supp. 285 (N.D. Cal. 1993) (upholding licensor's right to agree with licensee on price at which licensee makes first sale of licensed product). It is per se illegal, however, for a licensor to fix a licensee's resale price for the resale of a licensed product. *See* U.S. Dep't of Justice/Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property § 5.2 (1995).

I. Horizontal Agreements Restricting Internet Sales.

Naturally, horizontal agreements restricting Internet competition are subject to the same antitrust principles applicable to other horizontal restraints of trade. *See, e.g., Fair Allocation Systems, Inc.*, 1998 FTC LEXIS 116 (FTC, Oct. 22, 1998) (consent order; group of dealers collectively had threatened to boycott Chrysler unless Chrysler agreed to limit the number of vehicles available to competing dealers offering low prices through the Internet).

There undoubtedly are additional private business practices that impact competition on the Internet, but the provisions described above are those that have come to the attention of the members of the Antitrust Section as being the most significant.

Conclusion

The Section of Antitrust Law hopes that this catalog of state regulations and private business practices impacting competition in Internet commerce will provide the Commission a more complete basis for studying competition in e-commerce and reaching

informed conclusions. As stated earlier, should the Commission adopt specific proposals following the Workshop, the Section will consider formulating positions on such proposals at that time.